

Van Schaik



The Comptroller General
of the United States

Washington, D.C. 20548

Decision

Matter of: OAO Corp.; 21st Century Robotics, Inc.
File: B-232216, B-232216.2
Date: December 1, 1988

DIGEST

1. Protest by an offeror which would not be in line for award if the protest were upheld is dismissed because the protester does not have the requisite direct economic interest required to be considered an interested party under General Accounting Office's Bid Protest Regulations.
2. Contracting agency has discretion to determine degree of testing required to assess compliance with specifications in request for proposals (RFP) and General Accounting Office will disturb agency's determination only where it is shown to be unreasonable. Under RFP for ordnance disposal robots which included provision for testing to determine if robots met various specifications, protester failed to show that contracting agency testing and evaluation procedures were unreasonable where agency physically tested some requirements while verifying other requirements by determining that the proposed robots included components which met the requirements.
3. Protest contending that solicitation did not contain evaluation criteria is untimely when not filed until after the final revised closing date.

DECISION

OAO Corp. and 21st Century Robotics, Inc., protest the award of a contract to Standard Manufacturing Co., Inc., under request for proposals (RFP) No. DAAA09-88-R-0154, issued by the Army for 72 remote controlled explosive ordnance disposal (EOD) robots. We dismiss 21st Century's protest. We deny OAO's protest in part and dismiss it in part.

The robots sought under the solicitation are required to be "a mature design, the major components of which are currently available off-the-shelf and have been in production

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for at least one year." The robot will allow an operator, working at a safe distance, to visually inspect hazardous devices through a video system and remove and/or render safe such devices. The robot is to be controlled from a panel using either a radio frequency link (primary control mode) or a hard wire cable (secondary control mode). According to the solicitation, award was to be made based on price and other factors. No technical evaluation criteria were listed in the RFP.

The solicitation was issued on February 10, 1988. Amendment No. 0001, issued on March 9, extended the closing date until March 31 and added to the solicitation a provision for demonstration by the offerors of a series of solicitation requirements including the control modes, power supply, mobility and the video system. The amendment stated that a performance failure of the listed requirements would render the offer unacceptable.

Six firms submitted timely initial proposals, including Standard and the two protesters. Standard's initial price was \$27,132 each, with first article, compared to a range of \$40,884 to \$161,806 for the other offerors.

Demonstration tests were requested of the four low priced offerors, including Standard, 21st Century and OAO. Tests were conducted in late April by the Army's Explosive Ordnance Office; none of the four passed the required tests. Standard did not have available a robot for testing at that time and the other firms' robots failed to meet all of the requirements listed in amendment No. 0001.

While the demonstration tests were being conducted, the Army requested preaward surveys on Standard, 21st Century and OAO. The preaward survey of Standard recommended award to the firm based on its technical capability, its experience manufacturing robotic vehicles and the fact that major robotic components it proposed could be purchased off-the-shelf.

On May 26, the agency issued solicitation amendment No. 0002, which stated that a new demonstration would be required of each offeror "as deemed necessary." The amendment listed the solicitation provisions containing the characteristics which could be tested and stated that the tests would be on a pass/fail basis and that a failure under any of the listed provisions would render an offer unacceptable. The second test involved fewer characteristics than were included in the first test. The amendment required submission of "initial and revised offers" on or before June 10. According to the Army, the amendment

allowed submission of initial proposals by firms that had not previously submitted proposals because none of the four tested firms had met the test requirements and those requirements had been changed.

The six initial offerors submitted timely revised proposals and a seventh firm submitted an initial proposal. Standard's unit price was still \$27,132 with first article, while the other proposals ranged from \$35,893 for OAO to a high of \$161,806.

In June, demonstration tests were conducted by the Army's Ordnance Office on the robots of Standard and OAO, the two low offerors. The Army determined that both firms' robots met the requirements listed in the second amendment. According to the Army, had both Standard and OAO failed the tests, demonstrations would have been required of the next low offerors.

Best and final offers (BAFO) were requested and Standard lowered its unit price to \$25,897, OAO was second low at \$31,995 and 21st Century--which also submitted a BAFO--was third low at \$34,739. Award was made to Standard on July 28 for 72 robots at a total price of \$1,864,584.

The protesters contend that the competition was unfairly conducted since Standard was given a second opportunity to test a robot in June after not having one ready to test in April. The protesters argue, in this respect, that Standard should not have been allowed to continue in the competition after failing to have a robot ready to test in April.

The protesters also argue that the Standard robot that was finally tested in June was only a prototype, which was designed and built in response to this procurement and thus did not meet the solicitation requirement that it be a "mature design." Further, according to the protesters, although the list of requirements to be tested had been shortened for Standard's benefit, that firm's robot still was not tested for all of the requirements listed in amendment No. 0002. Further, in this regard, the protesters maintain that the robot tested was fundamentally defective in that it was merely a frame without a body or "skin," it had a vertical grip arm--which is useless in most bomb disposal situations--and required that its tracks be changed in order to meet the RFP mobility requirements.

The protesters also contend that Standard's robot should not have been found acceptable because that firm did not submit a complete operator's manual with its proposal as required

by the solicitation. In this respect, the protesters note that solicitation amendment No. 0002 stated that the manuals required in paragraph C.3.3 of the RFP's logistic support statement of work--which included operator manuals--were required with each offerors' proposal. They maintain that the only manual submitted by Standard with its proposal did not contain any information on how to operate the robot.

Finally, OAO argues that the solicitation was defective since it did not include evaluation factors or a clear statement of how the Army was to evaluate proposals and make award.

As a preliminary matter, the Army argues that 21st Century is not an interested party. Our Bid Protest Regulations, 4 C.F.R. §§ 21.0(a) and § 21.1(a) (1988), require that a party be "interested" before we will consider its protest. We have held that a protester is not interested where it would not be in line for award if its protest were upheld. JL Associates, Inc., B-225843.4, July 22, 1988, 88-2 CPD ¶ 69. Based on the final prices, 21st Century is third in line for award behind Standard and OAO; further, 21st Century has not challenged the agency's evaluation of OAO. Thus, even if 21st Century's protest were sustained, 21st Century still would not be eligible for award as OAO would be next in line. Accordingly, 21st Century is not an interested party to challenge the award to Standard.^{1/}

Turning to the merits of OAO's protest, notwithstanding language in amendment No. 0001 calling for rejection of proposals that fail to demonstrate characteristics included in any of the listed provisions, we see nothing objectionable in the Army's decision to retain Standard in the competition even though Standard did not have a robot ready to test in April. The Army indicates that it allowed Standard to participate in the second demonstration because its price was low, the preaward survey indicated that Standard was technically capable and because of representations by Standard that it could develop a robot meeting the requirements. In our view, that decision, which increased competition, was reasonable. In any event, we do not believe that OAO is in a position to complain since, although it had a robot to test in April, that robot did not pass the demonstration test.

^{1/} Although we have dismissed 21st Century's protest, essentially all the issues raised by 21st Century were also raised by OAO and thus, will be considered.

We also reject the argument that Standard's robot tested in June did not meet the RFP's mature design requirement. The solicitation defines a robot of mature design as one "the major components of which are currently available off-the-shelf and have been in production for at least one year." In our view, the RFP does not mean that the robot itself must be an off-the-shelf item but that it be made up of major components that are available off-the-shelf. Although OAO argues that Standard's robot should have been rejected because it was a prototype developed for this procurement, the Army notes that all offerors, except 21st Century offered prototype robots. Thus, it appears that most of the offerors and the agency interpreted the mature design requirement as we do.

According to the Army, the demonstration test team verified Standard's compliance with the mature design requirement through information in commercial manuals submitted with the proposal, information provided by Standard at the demonstration and personal knowledge of the commercial availability of the major components of Standard's robot. Although OAO generally disputes the Army's view, the protester refers to no major component of Standard's robot that was not currently available off-the-shelf and in production for 1 year and therefore we have no basis upon which to question the acceptance of the Standard robot as a mature design.

OAO also contends that the award to Standard was improper since the demonstration test team did not physically test Standard's robot for compliance with each of the provisions listed in amendment No. 0002. Essentially, the protester maintains that if the Army could not verify an offeror's compliance with the requirements by actual "pass/fail" testing then that offeror should have been failed for that characteristic and its robot rejected as unacceptable. We do not agree.

We have long been critical of operational or benchmark tests in which the strict application of pass/fail criteria leads to the automatic exclusion of a potentially acceptable proposal. 47 Comp. Gen. 29, at 53 (1967). We have held instead that the results of such tests are "strong evidence" of system capabilities which must be considered in the determination of technical acceptability. NBI, Inc., B-201853.3, Aug. 9, 1982, 82-2 CPD ¶ 114. Moreover, while the Army could have physically tested the offerors' robots for each of the listed requirements, we see no basis on which to conclude that the agency was required to do so. Amendment No. 0002, which included the demonstration test requirement, did not specify the extent of actual testing to

be done; rather, it stated that a demonstration would be required of each offeror's robot "as deemed necessary". The real question here, in our view, is whether the evaluation, which included actual testing in addition to a physical examination of Standard's test robot, its proposal and other information, was adequate to ensure that the Army will obtain a robot meeting the RFP requirements. See Wild & Leitz Technologies Corp., B-224302, Nov. 12, 1986, 86-2 CPD ¶ 552. In this respect, even if testing requirements are waived, the waiver does not affect the offeror's obligation to furnish supplies conforming to all of the RFP specifications. Le Don Computer Services, Inc., B-225451.2 et al., Apr. 28, 1987, 87-1 CPD ¶ 441.

Finally, in reviewing an agency's assessment of the technical acceptability of a proposal, we will not substitute our evaluation of the proposal for the agency's, but rather will examine the agency's assessment to ensure that it had a reasonable basis. PacOrd, Inc., B-224249, Jan. 5, 1987, 87-1 CPD ¶ 7.

OA0 maintains that the Army did not actually test Standard's robot for compliance with the mobility and braking specifications since Standard's robot was not tested on steel steps as specified in the RFP. According to the Army, however, the evaluation team verified compliance with these requirements by operating Standard's robot on a sloped wooden platform, on concrete and carpeted steps, on pavement and over a six inch rise. Based on the tests actually performed, the evaluation team concluded that the robot was capable of operating on all required surfaces including steel steps.

OA0 also maintains that the Army did not physically test whether Standard's robot met requirements for the video system, a continuous operating time of 50 minutes and requirements relating to the primary control mode, including a radio range of 900 feet. In response, the Army asserts that compliance in these areas was verified through visual inspection, operation of the robot and by confirming that Standard's robot included commercial off-the-shelf components that met the requirements. For instance, the test demonstration team determined that Standard's robot included a commercially available Motorola radio control system that could easily meet the 900 foot range requirement. OA0 does not challenge the agency's determination as to the range of the Motorola equipment but simply argues that the Standard robot was not physically tested at 900 feet.

While it is clear from the record that the Army did not have a well developed or carefully conceived test plan, nevertheless, we are not prepared to conclude that the test results were without a rational basis. It seems to us reasonable for the agency to conclude, for example, that a robot that can climb one type of stairs can climb another type. Further, we agree with the agency that certain characteristics can be verified by merely observing that the features are present especially when that characteristic, such as video capability, or radio control are performed by well established commercially available components. We also think that it was significant that in all the major areas where the agency did not actually require a full demonstration to verify a particular characteristics both offerors were treated equally.

We also reject OAO's contention that Standard's proposal should have been rejected because its robot was tested without a body shell, it had a vertical gripper, and used different tracks on different surfaces.

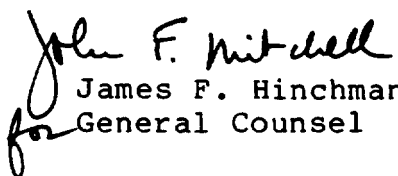
First, contrary to OAO's position there were no requirements in the solicitation that the robot have a shell, a horizontal as opposed to vertical gripper or that it use only one set of tracks under all conditions. Thus, none of these have been a basis for rejection. If OAO was concerned about a lack of these characteristics in the RFP, it should have raised the matter with the agency prior to the submission of the amended proposals rather than after the testing was completed. Nonetheless, the Army informs us that Standard has agreed to provide, at no increase in the contract price, a skin for the robot, a gripper that operates horizontally and tracks which will operate on all surfaces.

OAO also complains that Standard's robot should have been rejected as that firm did not submit an operator's manual. While the solicitation contains several rather confusing provisions relating to commercial operating manuals, we think that the solicitation as modified by amendment No. 0002 literally required delivery with the offers of draft operator's manuals specified at RFP section C.3.3. Since the agency does not agree that the delivery of operator's manuals was specified, it has not provided us with a rationale for such a requirement. The protester, on the other hand, speculates that operator's manuals were required because of the agency's desire to operate the robots at the demonstration tests without having to rely on help from the offeror.

It appears from the record that Standard did not submit an operator's manual with its offer.^{2/} We do not, however, agree with OAO that this failure is an appropriate basis for rejection of Standard's proposal. Initially, the requirement itself was not clearly expressed and may well not have been intended. In this regard, there does not seem to be much use for the preaward submission of such a manual as there were no problems in operating either robot during testing--there is no indication that a manual was used during the OAO test--and there was no separate technical evaluation where the manual could be used.^{3/} In view of the above and since operator's manuals are minor items which are clearly required to be provided under the contract, we do not think any useful purpose would have been served by rejecting the low otherwise acceptable offeror on this basis. See Automecha, Ltd.--Reconsideration, B-227252.2, Jan. 20, 1988, 88-1 CPD ¶ 53.

Finally, OAO's contention that the solicitation did not indicate how the Army was to evaluate proposals is untimely. Under our Regulations protests challenging alleged improprieties apparent on the face of an RFP or incorporated into an RFP must be filed before the due date for initial proposals or before the next due date following the incorporation. 4 C.F.R. § 21.1(a)(1). Here, since OAO did not protest until August 5, after the final closing date, its protest of the evaluation scheme set out in the solicitation and the amendments is untimely. Royal Zenith Corp., B-227933, Oct. 28, 1987, 87-2 CPD ¶ 409.

The 21st Century protest is dismissed and OAO's protest is dismissed in part and denied in part.


James F. Hinchman
for General Counsel

^{2/} Standard suggests that it did submit such a manual; the agency does not agree.

^{3/} There was no comparative technical evaluation. Award was to be made to the low priced acceptable offeror.